ceedings commenced and, as such, there is nothing left for the judgment creditor to satisfy the judgment debt.

For the above reasons, I hold that there is material irregularity in the auction sale in that the Order of Sale dated July 3, 1975 ought not to have been made in the first instance. As *bona fide* purchasers for value of the debtor's whole interest in the land, both the applicants are persons whose interests are affected by the auction sale and, as such, they have *locus standi* in this matter as provided under Order 43 rule 11(e) of the Rules of Supreme Court. By reason of the improper issue of the Order of Sale, to my mind, there is a material irregularity as far as the conducting of the sale is concerned, and that the applicants as *bona fide* purchasers, have sustained substantial injury by reason of such irregularity.

I would therefore allow the application and set aside the auction sale. I also order that the purchase money, if already paid by the second respondent pursuant to the auction sale, should be refunded to him without interest.

Application allowed.

Solicitors: *Michael Chen & Lee; Morris Edgar & Co.*

T.C.S. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Syed Agil Barakbah J.) July 10, 1976]
[Alor Star — Originating Motion No. 22 of 1975]

Revenue Law — Income Tax — Sale of land — Isolated transaction — Whether adventure or concern in the nature of trade — Income Tax Act, 1967, s. 4(a).

This was an appeal on a question of law from the deciding order of the Special Commissioners. The question of law for the opinion of the court was whether on the evidence before them the Special Commissioners' decision that the isolated transaction in this case was an adventure or concern in the nature of trade and any profits or gains derived therefrom was assessable to income tax, was correct. The taxpayer in this case had bought some padi land for $31,500 and after getting approval for the alteration of the condition of tenure of the land sold it to a limited liability company for $580,000. The taxpayer transferred the profit in the form of shares to his wife and children. The taxpayer was assessed to tax in the sum of $538,790 and his appeal to the Special Commissioners was dismissed.

Held: the only conclusion that could be reasonably drawn on the facts as found by the Special Commissioners was that the appellant acquired the land with the expectation and intention of selling it as a profit and that it was an adventure in the nature of trade.

Cases referred to:-

(1) *E.* v. *Comptroller General of Inland Revenue* [1970] 2 M.L.J. 117, 122.
(2) *Commissioners of Inland Revenue* v. *Livingstone & Ors.* 11 T.C. 538, 542-543.
(3) *Eames* v. *Stepnell Properties Ltd.* [1967] 1 W.L.R. 593.
(4) *Californian Copper Syndicate* v. *Harris* 5 T.C. 159.
(5) *Taylor* v. *Good* [1974] 1 W.L.R. 556.
(6) *Cooksey and Bibbey* v. *Rednall* 30 T.C. 514.
(7) *Tebrau (Johore) Rubber Syndicate Ltd.* v. *Farmer* 5 T.C. 658.
(8) *Leeming* v. *Jones* 15 T.C. 333.
(9) *Hudson's Bay Co. Ltd.* v. *Stevens* 5 T.C. 424.
(10) *Commissioners of Inland Revenue* v. *Fraser* 24 T.C. 498, 501.
(11) *Smith Barry* v. *Cordy* 28 T.C. 250, 258.
(12) *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, 184.
(13) *Rutledge* v. *Commissioners of Inland Revenue* 14 T.C. 490, 496.
(14) *Thew* v. *The South West Africa co. Ltd.* 9 T.C. 140, 158-159.
(15) *Williams* v. *Davies* 26 T.C. 371.

CASE STATED.

Lim Ewe Hock for the appellant.

Abdul Rashid (Senior Federal Counsel) for the respondent.

Syed Agil Barakbah J.: This is an appeal on a question of law made under Schedule 5, paragraph 34 of the Income Tax Act, 1967, against the deciding order of the Special Commissioners who have accordingly stated a case for the opinion of the High Court. The appellant appealed to the Special Commissioners in respect of the sum of $538,790 which was included under trade income in the assessment of income tax for the year of assessment 1974 as per notice of additional assessment dated January 18, 1975. The only ground of appeal was "that the sum of $538,790 included in the assessment under the heading of Trade Income is a capital profit not chargeable to income tax". In determining the sole question whether the said sum was assessable to income tax within the meaning of section 4(a) of the Act, the Special Commissioners decided that "there was evidence in abundance which all pointed one way, that the only reasonable conclusion we could arrive at was that this isolated transaction was an adventure or concern in the nature of trade and any profits or gains derived therefrom were assessable to income tax". Accordingly an order was issued by notice of additional assessment to the effect that the said sum included in the additional assessment for the year of assessment 1974 dated January 18, 1975, is assessable to income tax as it constitutes income in respect of gains or profits from a business within the meaning of section 4(a) of the Income Tax Act, 1967.

The question of law for the opinion of this court is whether on the evidence before them the Special Commissioners' decision that the isolated transaction was an adventure or concern in the nature of trade and any profits or gains derived therefrom were assessable to income tax, was correct.

Mr. Lim Ewe Hock appeared for the appellant and Senior Federal Counsel Encik Abdul Rashid for the respondent.

Both parties conceded from the very beginning that the transaction involved a single isolated transaction.

The following facts were not in dispute: —

(i) The appellant was a sundry shopkeeper, aged 50 years, who carried on his business at No. 53, Jalan Tunku Ibrahim, Alor Setar, Kedah. He was also a licensed moneylender.

(ii) On September 3, 1961, he entered into an agreement (hereinafter referred to as "the first agree-

ment") with one Madam Soh Tuan (hereinafter referred to as "the vendor") of Batu 2, Jalan Langgar, Alor Setar, Kedah, for the sale of padi land (hereinafter referred to as "the property") in area 7 relongs 266 jembas (5 acres 1 rood 19 poles) held under Surat Putus Kechik No. 14750, Mukim Alor Malai, Alor Setar District, Kedah, and shown on the survey plan as Lot 336, for the sum of $31,500.

(iii) The relevant clauses of the first agreement for the purpose of this appeal were as follows:

"4. It shall be a condition of the sale that the vendor shall apply for and obtain Government permission for alteration of the condition of tenure of the said land so that the said land may be used for the exclusive purpose of erecting dwelling-houses thereon.

5. After the Government permission shall have been obtained for alteration of condition of tenure of the said land as aforesaid, the vendor shall apply to the Town Council for approval to erect houses on the said land in numbers and of a specification to be determined and for this purpose the vendor expressly binds himself to execute and sign all necessary or requisite papers or documents or other writings whatsoever and to take all necessary steps and in general to extend to the Purchaser all reasonable assistance and co-operation that may be required.

6. The vendor shall within the said period of eight (8) months take immediate steps to effect the removal of the four existing houses on the said land.

7. ....

8. In the event of such permission for change of condition of tenure of the said land being refused by the Government, or of its proving impossible to obtain the approval of the Town Council for erection of dwelling-houses and to effect the immediate removal of the existing houses on the said land, then the vendor shall be bound forthwith to refund to the purchaser the said sum of Dollars Nine Thousand ($9,000) and the present agreement shall then thereafter be treated as voided and of no effect."

(iv) On July 4, 1963, the solicitor acting for the vendor was informed by the Ketua Pejabat Tanah, Kota Setar, Kedah, that her application for "the excision of agricultural condition of bendang-kampong in order to develop the land for dwelling-houses for sale" in respect of the property could not be considered "as the Agricultural Department has raised objection."

(v) On July 4, 1963, the appellant was informed by the solicitor acting for the vendor that the vendor would like to treat the agreement as null and void, and that she had paid the sum of $9,000 to be refunded to appellant as she was unable to obtain the necessary approval from Government to change the condition of tenure of the property.

(vi) After an exchange of a series of letters between solicitors acting for the appellant and for the vendor from July 18 to August 4, 1964, a new agreement (hereinafter referred to as "the second agreement") was entered into between the appellant and the same vendor on March 9, 1966.

(vii) Clauses 4 and 5 of the second agreement reproduced word for word clauses 4 and 5 of the first agreement. Clauses 6 and 8 of the second agreement were as follows:

"6. The vendor shall within the said period of three (3) months take immediate steps to effect the removal of the four existing houses on the said land.

7. ....

8. In the event of such permission for change of condition of tenure of the said land being refused by the Government, or of its proving impossible to obtain the approval of the Town Council for erection of dwelling-houses and to effect the immediate removal of the existing houses on the said land, then the vendor shall be bound forthwith to refund to the purchaser the said sum of Dollars Thirteen thousand three hundred and nine and Cents forty five ($13.309.45) and present agreement shall then thereafter be treated as voided and of no effect."

The differences in the wording between clauses 6 and 8 of the second agreement and the respective clauses of the first agreement are as underlined above.

(viii) After the execution of the second agreement the vendor did not transfer the property to the appellant. The appellant then sued the vendor in the Registry of the High Court at Alor Setar for specific performance of the second agreement during which period of litigation two civil suits were filed, viz. Civil Suit No. 133 of 1966 and Civil Suit No. 114 of 1968.

(ix) In compliance with the order of court dated July 11, 1971 in Civil Suit No. 114 of 1968 the vendor executed a registrable transfer of title in the property to the appellant and he became the registered owner of the property on August 10, 1971. The appellant thus accepted the transfer of the property to himself without the vendor fulfilling any of the conditions under clauses 4, 5 and 6 of the second agreement.

(x) On September 13, 1971, the appellant himself applied to the State Government for alteration of the condition of tenure of the property and on February 18, 1973, the Collector of Land Revenue, Kota Setar, notified the appellant of the approval of his application.

(xi) On April 15, 1973, the appellant entered into an agreement with a limited liability company by the name of Chai Hup & Sons Sendirian Berhad to sell the property for the sum of $580,000 and the appellant was paid in shares equivalent in value to $580,000 by the said company.

(xii) The appellant later transferred these shares worth $580,000 in the said company to his wife and children as follows: —

Tan Siew Kia (wife) 290,000 shares at $1 per share.

Teoh Kim Heoh (daughter) 58,000 shares at $1 per share.

Teoh Peng Seng (son) 58,000 shares at $1 per share.

Teoh Kim Toon (son) 58,000 shares at $1 per share.

Teoh Peng Cheng (son) 58,000 shares at $1 per share.

Teoh Kim Choo (daughter) 58,000 shares at $1 per share.

(xiii) The appellant also became a director of Chai Hup & Sons Sdn. Bhd. without any shareholding qualification under article 71 of the articles of association of the said company.

Let me first deal with the principle applicable to a single isolated transaction. In *E.* v. *Comptroller-General of Inland Revenue*,[1] Gill F.J. (as he then was) said: —

"Whilst a trade usually consists of a series of transactions implying some continuity and repetition of acts of buying and selling or manufacturing and selling... the mere fact that there is only one transaction does not preclude the possibility that that transaction is in the nature of a trade...."

The test is as explained by Lord President Clyde in *Commissioners of Inland Revenue* v. *Livingston & Ors.*[2]: —

"I think the test, which must be used to determine whether a venture... is, or is not 'in the nature of trade', is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as 'in the nature of trade', merely because it was a single venture which took only three months to complete...."

From the numerous authorities cited, both English and local, relating to an isolated transaction in land, as in the present case, the position may be classified as follows: —

(1) Where the intention of purchase or acquiring land is for selling it at a profit whether in the case of an individual or a company, and the sale transaction was subsequently carried out at a profit. In *Eames* v. *Stepnell Properties Ltd.*,[3] the acquisition of land was with the intention and in the expectation of selling it to the local authority at a profit. Again in *Californian Copper Syndicate* v. *Harris*,[4] the company was formed for the express purpose of acquiring mining properties and it sold the whole of its assets about a year later. It was held that the company had acquired the properties with the object of reselling them. In upholding the decision of the General Commissioners the court relied upon the smallness of the company's capital available for developing the mines. It was manifest from the facts that the company never intended to work the mines itself but to induce another party to purchase the mines so that the company would make a profit in that way.

Similarly in *E.'s* case, *supra*, the appellant having purchased jointly with others, a rubber estate subsequently sold the estate to a company one of whose objects was to develop lands into housing estates, for a considerable profit. The appellant became entitled to $382,500 for which he became entitled to shares of that value in the company. He was assessed to additional assessment in respect of the amount representing the excess of the value of the shares in the company to which he became entitled over the assets of his share in the purchase price of the land.

In all these three cases it was held that the transaction or trading was an adventure in the nature of trade.

(2) Where the property is purchased as an investment and the taxpayer has no initial intention of selling it for a profit.

In *Taylor* v. *Good*,[5] the taxpayer purchased a house with grounds with a possibility that he and his family might live there but he later took steps to enhance its value by obtaining planning permission for development and subsequently sold it for development. It was held that his activities did not amount to an adventure or concern in the nature of trade assessable to income tax. The *ratio decidendi* in that case was the dealing in the land previously acquired was with no thought of dealing so that there was no question at all of its absorption with a trade. He was not a property developer and bought the land with no initial intention of selling it for a profit.

Similarly in *Cooksey and Bibbey* v. *Rednall*,[6] the appellants purchased a farm with the intention of occupying it for farming. Apart from subscribing part of the purchase money, the rest was raised by mortgage. Later they let the farm at a rental which was a good return on the investment. After making certain improvements on the land, they later sold it at a considerable profit. They had other activities which were admitted to be transactions in the nature of trade. However, as regards the sale of the farm the court disagreed with the view of the General Commissioners and held that the sale transaction was not in the nature of trade and was therefore not assessable to income tax.

(3) Where the profits result from appreciation of the capital.

The case of *Tebrau (Johore) Rubber Syndicate Ltd.* v. *Farmer*[7] concerned a company formed with the object of acquiring estates in the Malay Peninsula and developing them by planting and cultivating rubber trees. The Memorandum of Association provides power to sell the property as contemplated in the prospectus issued at the inception of the company. The company purchased two estates but as they did not have sufficient capital to develop them the whole of the undertaking was sold to a second company, mainly in shares of the latter company, in excess of the capital expended. At the date of the sale a considerable acreage had been planted but no rubber had yet been produced or sold. It was held that the profit on the sale was not a profit assessable to income tax, but was an appreciation of capital.

The basis of the decision seems to be that there is no difference in that case from that of a person who acquires property by way of investment and who realises it afterwards at a profit. The profit is not part of the person's annual income but results from an appreciation of his income.

Similarly in *Leeming* v. *Jones*[8] where there was an organisation by the taxpayer with two others of purchasing two rubber estates with a speculation of maturing the property and disposing of it to a company to be formed for the purpose and obtaining a commission. It was held the transaction in question was not a concern in the nature of trade on the basis but it was a capital accretion and not taxable for the reason that it was not a source of income. It appears that a single profit cannot form the subject of assessment. (Per Lord Hanworth M.R., page 353).

In *Hudson's Bay Co., Ltd.* v. *Stevens*,[9] the company obtained a large territory by means of a Royal Charter which they subsequently surrendered to the Crown in exchange for a money payment and a share in certain lands. The lands were sold by the com-

pany from time to time to settlers and the proceeds were applied partly in payment of dividends and partly in reduction of capital. It was held to be selling its capital and not trading in the land; the proceeds of the sales were not profits or gains derived by the company for carrying on a trade in dealing in land and were not assessable to income tax. Russell L.J. in *Taylor* v. *Good, supra* at page 559 discussed *Hudson's Bay's* case, *supra* "as no different in substance from the case of a landowner minded to sell, or sell from time to time, inherited land for building purposes at a profit; it was equivalent to dealing with land merely as owner; the fact that a landowner lays out part of his estate with roads and sewers for sale in building lots does not constitute a trade, nor the fact that he may have expended money in getting the property up for sale; it was no different ... in substance from an ordinary landowner who sells parts of an estate which he acquired by purchase...."

The above cases are dealt with as guidance in order to determine whether the Special Commissioners have applied the correct principles in the case under discussion.

Now, the findings of fact are for the Special Commissioners and the High Court considers appeals on questions of law. The court will not disturb any finding of pure facts unless there is no evidence to justify the finding or where incorrect reasons of law prompt their conclusion of fact, and where the Commissioners have taken an erroneous view as to the nature and effect of a document, or have applied erroneous tests in arriving at their conclusions of fact or have otherwise misdirected themselves in law or drawn a wrong inference from the facts. (See Simon's Income Tax, 2nd Ed., Vol. 1, page 280, and also *Commissioners of Inland Revenue* v. *Fraser.)*.[10] The power of the court to interfere with their conclusion, which is basically a conclusion of fact, is therefore limited. (Per Willmer L.J. in *Eames* v. *Stepnell Properties Ltd.*, page 614, *supra*).

Mr. Lim Ewe Hock submitted that the Special Commissioners have not specified whether the gains or profits are from trade and adventure or concern in the nature of trade. With respect, I think they have done so at page 12, paragraph 11 of the Case Stated. They said:— "...the sum of $538,790 ... was assessable to tax as it constituted income in respect of gains or profits from a business within the meaning of section 4(a) of the Income Tax Act, 1967". The sub-section classifies any income from gain or profit from a business for whatever period of time carried out, as being chargeable to income tax. The definition of "business" in section 2 of the Act includes an adventure or concern in the nature of trade. As "trade" is not defined, it should be used in its ordinary dictionary sense. The most appropriate meaning according to the Oxford Dictionary is "a pecuniary risk, a venture, a speculation, a commercial enterprise". (See Scott L.J. in *Smith Barry* v. *Cordy*).[11] In legal usage it should be given the widest scope. (See *National Association of Local Government Officers* v. *Bolton Corporation*).[12]

A number of grounds of the Special Commissioners were also attacked on the allegation of having arrived at wrong inferences on the facts particularly on the documentary evidence. I do not propose to deal with them singly but will touch on them in the course of this judgment.

The appellant himself gave evidence before the Special Commissioners and exhibited numerous documents which would appear to have been dealt with by the Commissioners. After careful study of the facts which were not disputed, the contention of the appellant and the respondent and the grounds and conclusion of the Special Commissioners appearing in the record, I form the opinion that the Special Commissioners proceeded in the right direction by treating the question of the intention of the appellant as ascertained by his subsequent conduct as being of paramount importance. According to the principle adopted in *Rutledge* v. *Commissioners of Inland Revenue*,[13] Clyde L.P. says:—

"....It has been said, not without justice, that mere intention is not enough to invest a transaction with the character of trade. But, on the question whether the appellant entered into an adventure or speculation, the circumstances of the purchase, and also the purchaser's object or intention in making it, do enter, and that directly, into the solution of the question."

The appellant's contention in the present case is that the transaction being an isolated one, his intention of purchasing the land was to keep it for his old age, that he bought the property as an investment and that subsequently having realised the investment at a profit, it amounted only to a capital appreciation which would not be assessable to income tax. Further, on the facts there existed only an adventure but not an adventure in the nature of trade.

Now, the question whether a particular adventure is "in the nature of trade" or not must depend on its character and circumstances. If the purchase is made for no other purpose except for a resale at a profit, as in the case of the purchase of a large quantity of paper at a cheap price and selling it within a short time at a profit as in *Rutledge's* case, *supra*, there is no difficulty in concluding that the deal was in the nature of trade.

What is more important is the nature of the transaction with reference to the commodity dealt in. A purchaser may intend to sell the article he purchased at a profit yet it may not be the only purpose for he may not sell it if a favourable opportunity of sale does not arise. It is like the purchase of a picture with a view to sale but the purchaser kept it for aesthetic enjoyment having changed his mind but subsequently sold it at a profit. A man may purchase land with the intention of selling it at a profit but continues to hold it and enjoy its income for sometime thus indicating a certain pride of possession. The subsequent sale at a profit as was held in *Cooksey and Bibby* v. *Rednall, supra*, was not a transaction in the nature of trade.

Each case of course depends on the facts and surrounding circumstances which have to be considered as a whole. I find that the Special Commissioners in coming to their conclusion have fully considered those facts and circumstances, adopted the correct test and principles and concluded by way of

logical and reasonable inference that the isolated transaction was an adventure in the nature of trade. The full facts and exhibits were at their disposal and from there they took into consideration the circumstances of the purchase including the appellant's conduct which invariably led to the only irresistible inference that his intention and object was to sell the land at a profit and not to keep it and enjoy the income for his old age. That in my considered judgment is manifest from the very beginning from the three conditions at paragraphs 4, 5 and 6 of the two agreements entered into with the original owner, viz. for permission to alter the condition of tenure of the said land into that of dwelling houses, for asking approval from the Town Council to erect houses on the said land in numbers and specifications to be determined later and for taking immediate steps for the removal of the four houses standing on the said land. In spite of the failure by the then owner to fulfil any of these conditions, the appellant stuck on in purchasing the land by being prepared to forego the conditions and not exercising clause 8 of the agreement in treating it as null and void and claiming the refund of the deposit he had paid to the vendor. A series of correspondence between them through their solicitors ensued until the appellant filed a civil action for specific performance of the agreement. It seems the action was discontinued at his instance but by consent judgment the appellant was prepared to and paid a sum of nearly $10,000 over and above the agreed sum for the land to the vendor for transferring it to his name without any of the three conditions being fulfilled. Then he applied for the conversion himself and while waiting for the answer he got rid of the dwellers by paying monetary compensation to them. He also took steps to request for a valuation report from a chartered surveyor, C.H. Williams & Company through Lim Cheng Tat & Company well before the approval for conversion. The report and valuation show the property being surrounded by residential development of semi-detached and terraced houses, had a good potential value for similar development which would incur considerable expense. However, he had no funds to develop the land for erecting houses thereon as shown in the statement of accounts.

In the case of a company faced with a similar situation, Harman L.J. in *Eames* v. *Stepnell Properties Ltd., supra* says at page 619: —

"....It appears to me to matter not at all that this company had been originally projected as an investment company, and that it has since acted as an investment company; it had no assets so to act at that time, its capital being £2...."

About two months after his application for conversion of the land was approved, the appellant sold the said land by entering into a sale agreement with the newly formed company stated above for $580,000, *i.e.* with a large amount of profit. However, he agreed to be paid in shares of the company and transferred all the shares to his wife and children with himself becoming a director without any shareholding according to Article 71 of the company's Memorandum of Association.

From the above, it is manifest that the appellant's initial intention to sell the property at a profit never changed. As rightly said by the Special Commissioners, he doggedly carried out the plan till he sueceeded. Although it is true he took a risk in getting the approval for conversion, for at the time of application he could never be sure of getting approval in the light of the previous rejection by the authorities, yet he took the chance and by a stroke of luck obtained the approval. It is true in his evidence he said his intention was to develop the land in the future. Can it be safely said that he purchased the land as an investment? In *Eames* v. *Stepnell Properties Ltd., supra*, Buckley J. said at page 609: —

"....I cannot myself accept the view that the purchase of property which is on the verge of being sold can be properly regarded as an investment, for one element at least of investment must be that the acquirer of the investment intends to hold it, at any rate for some time, with a view to obtaining either some benefit in the way of income in the meantime, or obtaining some profit, but not an immediate profit by resale...."

But he did not carry out any development nor keep the land and enjoy the benefit of the rents or produce. Further, he did nothing to improve the land as in *Tebrau's* case, *supra* after obtaining a conversion which through governmental development changed the status of the land into a high potential value. What he actually did was an immediate sale and with a big profit. He bought an agricultural land and sold a development land.

This case must be distinguished from *Taylor* v. *Good, supra* in which the taxpayer bought land, without the initial intention of selling it at a profit but of staying there with his wife and family. It is more in line with the *Californian Copper Syndicate's* case, *supra*, in which the company's capital was too small for development purpose and its object was to resell the property at a profit.

In support of the appellant's contention that he purchased the land as an investment which by subsequent sale at a profit amounted to a capital appreciation, it was submitted that the Special Commissioners did not take into consideration the statement of account (Folio A55) which shows the land in question and the profit of its sale placed under fixed assets. Suffice it for me to quote Pollock M.R. in *Thew* v. *The South West Africa Co. Ltd.*[14]: —

"The question that we have to determine is whether the moneys derived from those sales of land fall into income or are to be treated as capital of the Company.... We have had our attention called to a number of documents relating to the dealings of the Company with the German Government, a prospectus on which it asked for further capital which it was to raise by the sale of shares, and a number of other documents. I agree that those are really indeterminate and do not yield a guiding line on the relevant points in the case.... The fact that they sold the land does not give any guidance at all. The fact that they had from time to time put the money to a separate account... does not determine the matter, for we have to decide upon the substance of the case and not upon what any individual company may deem the particular item in the course of its trading."

I do not consider it necessary to discuss at length the four conditions laid down in *Leeming* v. *Jones, supra*, one of which must be present to establish the existence of an adventure in the nature of trade. Gill F.J. (as he then was) in *E.'s* case considered a single transaction of purchase and sale of land as

distinct from the purchase and sale of whisky in *Commissioners of Inland Revenue* v. *Fraser, supra.* Be that as it may, the Special Commissioners found all of the conditions present in this case. On my part, if I do not entirely agree with them, I think at least two of the conditions were present, viz. activities which led to the maturing of the asset to be sold and the fact that the nature of the asset should lend itself to commercial transactions. On the first point, the appellant's activities in paying compensation to get rid of the occupants of the four houses on the land, his request for valuation and his successful application for conversion for building purposes are sufficient activities to lead to the maturing of the asset to be sold, although he did nothing on his own to improve the land. Secondly, the nature of the land itself being near the town and surrounded by a newly developed housing area should lend itself to commercial transactions even without conversion for otherwise the appellant would not have stuck to his bargain to the extent of taking legal proceedings which ended in him paying a larger sum to the vendor to own the land himself in spite of the conditions for its improvement not having been fulfilled.

In the circumstances I cannot regard the transaction as an investment and/or the profit from the sale to amount to a capital appreciation. It seems to me that the only conclusion on the facts as found by the Special Commissioners is that the appellant acquired the land with the expectation and intention of selling it at a profit and that was an adventure in the nature of trade.

With regard to the action of the appellant in transferring the shares of Chai Hup & Company to his wife and children and he becoming a director of the company without any shareholding, I do not consider that the case of *Williams* v. *Davies*[15] is in point. There is a subtle distinction as in that case the husband through a well-planned scheme made a gift of the lands purchased to his wife who in turn sold them at a profit. The wife was held to be the beneficial owner of the properties in question and did not hold them as nominee or trustee for her husband. In the present case the appellant having purchased and sold the land at a profit in his name transferred the profit in the form of shares to his wife and children. To my mind, if it was a scheme to avoid assessment of income tax, it was not so well-planned as the case stated above.

In the result, I would dismiss the appeal with costs and confirm the decision of the Special Commissioners.

Appeal dismissed.

Solicitors: *Lim Ewe Hock.*

RE TAN BOON LIAT @ ALLEN & ANOR.; TAN BOON LIAT & ANOR. v. MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

[O.Cr.J. (Arulanandom J.) August 26, 1976]

[Penang — Miscellaneous Criminal Applications Nos. 13 and 14 of 1976]

Administrative Law — Habeas Corpus — Persons detained under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Written representations against orders of detention made — Recommendations to Yang di-Pertuan Agong not made within three months — Whether detention illegal — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, s. 6 — Criminal Procedure Code (F.M.S. Cap. 6), s. 365 — Federal Constitution, art. 151(1)(b).

In this case the applicants had been detained under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. They made written representations against their orders of detentions and inquiries were held but the Advisory Board did not make their recommendations within three months of the detention of the applicants. At the time of the applications, however the Advisory Board had made their recommendations to the Board, though after the three months. It was argued that the continued detention of the applicants after a lapse of three months from the date of the original order of detention became illegal and unlawful if within the three months the Advisory Board had not met to consider the representations made by the applicants and following on that made representations to the Yang di-Pertuan Agong.

Held: while the procedural requirements had not been complied with in this case, valid orders of detention were in force against the two applicants and their detention was therefore legal.

Cases referred to:-

(1) *Dharma Singh* v. *State of Punjab* A.I.R. 1958 S.C. p. 152.

(2) *Abdul Karim & Ors.* v. *State of West Bengal* A.I.R. 1969 S.C. p. 1028.

(3) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129, 148.

(4) *State of Bombay* v. *Atma Ram* A.I.R. 1951 S.C. 157.

(5) *Ooi Ah Phua* v. *Officer-in-charge, Criminal Investigations, Kedah/Perlis* [1957] 2 M.L.J. 198.

CRIMINAL APPLICATION.

Karpal Singh (*K. Kumaraendran* and *K. Balasundaram* with him) for the applicants.

Zaki bin Azmi (Deputy Public Prosecutor) for the respondents.

Arulanandom J.: These are two applications by detenus for writs of *habeas corpus* directed to (1) the Menteri Hal Ehwal Dalam Negeri, Malaysia; (2) Ketua Polis Negara, Malaysia, and (3) Penguasa Kanan Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang, to have them brought before this Honourable Court together with the day and cause of their being taken and detained to undergo and receive all and singular such matters and things as this Honourable Court shall then and there consider or concerning them in this behalf upon the grounds set forth in their affidavits. Although there is a slight difference in the facts of the two cases the issues involved are identical and at the outset it was agreed by counsel that the court would deal with both these cases together.

The facts in the case of Tan Boon Liat @ Allen is that he was detained for a period of two years under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, at Pulau Jerejak by an order of detention under the hand of